

FILED

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Barbara Adamick, District Clerk

CAUSE NO.

09-01-00564

AUER CORPORATION,

PLAINTIFF

V.

WHEELER HOSPITALITY, INC., and
TOLI, INC.

DEFENDANTS

§ IN THE DISTRICT COURT

§ 410th JUDICIAL DISTRICT

§ MONTGOMERY COUNTY, TEXAS

PLAINTIFF'S ORIGINAL PETITION

Auer Corporation ("Auer"), Plaintiff, files this its Original Petition against Wheeler Hospitality, Inc. and Toli, Inc. (collectively "Wheeler"), and in support hereof shows:

I.**Discovery**

Discovery in this cause shall be conducted under Level 2 pursuant to Rule 190.3 T.R.C.P.

II.**Parties**

2.01 Plaintiff, Auer is a Texas Corporation with its principle office in Montgomery County, Texas.

2.02 Defendant, Wheeler Hospitality, Inc. is a Texas Corporation doing business in Montgomery County, Texas, and may be served with process by serving its registered agent, Harish Patel, at its registered office located at 1424 Riverside Rd., Roanoke, Texas 76262.

2.03 Defendant, Tolie, Inc. is a Texas Corporation doing business in Montgomery County, Texas, and may be served with process by serving its registered agent, Harish Patel, at its

registered office located at 104 E. 12TH Street, Shamrock, Texas 79079.

**III.
Venue and Jurisdiction**

3.01 Wheeler entered into a construction contract (the "Contract") with Auer, and the Contract was to be performed in part in Montgomery County, Texas. Said Contract contains a forum selection clause with respect to which the parties agreed the District Courts of Montgomery County, Texas would have both venue and personal jurisdiction of disputes arising out of such Contract. Plaintiff's cause of action arose in part in Montgomery County, Texas.

3.02 The amount in controversy is within the jurisdictional limits of this Court.

**IV.
Factual Background**

4.01 Auer entered into a construction contract with Wheeler to construct a Baymont Inn in Wheeler County, Texas ("the Hotel"). Wheeler materially breached the Contract by, inter alia, failing to pay Auer. In fact, after numerous accommodations and changes on Auer's part to construct the Hotel to Wheeler's specifications and directions, and notwithstanding Wheeler signing off on draw request authorizations, Wheeler nonetheless refuses to pay Auer for the materials and labor furnished with regard to the construction.

4.02 Wheeler has prevented Auer's performance under the Contract.

**V.
Breach of Contract**

5.01 Auer hereby incorporates Paragraph IV in its entirety.

5.02 The acts of Wheeler in failing to pay Auer pursuant to the Contract constitutes a breach of contract for which Auer to recover its actual damages.

**VI.
Fraud**

6.01 Auer hereby incorporates Paragraph IV in its entirety.

6.02 The acts of Wheeler as set forth herein in inducing Auer to continue to provide materials and labor for the construction of the Hotel and in inducing Auer to continue construction of the Hotel, while intending not to pay Auer for said construction constitutes fraud for which Auer hereby seeks to recover its actual damages and punitive damages.

**VII.
Attorney's Fees**

As a result of Defendants' wrongful failure to pay the amounts due and owing to Auer, it has become necessary for Auer to employ the services of the undersigned attorney to aid in the collection of all sums due and owing to Auer. Auer sent demand pursuant to Sec. 38.001 et seq, Tex. Civ. Prac. and Rem. Code, and is entitled thereunder to recover its reasonable and necessary attorneys fees.

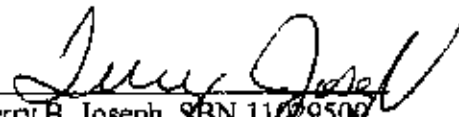
**VIII.
Condition Precedent**

All conditions precedent to Auer's right to recover the relief sought by this suit have occurred or have been satisfied.

Wherefore, Plaintiff, Auer, prays that Wheeler be cited to appear and answer as required by law, and that upon final hearing, Auer be awarded judgment against Wheeler for Auer's actual damages, together with prejudgment and post-judgment interest at the legal rate, punitive damages, costs of court and attorney's fees, and that Auer be granted such other and further relief as to which it may be justly entitled.

Respectfully submitted,

The Joseph Lawfirm

By: 

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**ATTORNEY FOR PLAINTIFF,
AUER CORPORATION**